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Settling U.S.-Canada Disputes: Lessons for NAFTA

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SETTLING U.S. - CANADA DISPUTES: LESSONS FOR NAFTA

ANNETTE BAKER FOX

Despite the great discrepancy in political influence, the United States and Canada have been settling certain kinds of disputes between each other in ways which more or less ignore their unequal power. Under the Boundary Waters Treaty negotiated in 1909, the International Joint Commission (IJC)* has dealt successfully with a number of environmental issues arising between the two countries. Since the Free Trade Agreement (FTA) of 1988, the two governments have been handling a variety of controversies affecting their economic relations. In other ways different, both systems for dispute settlement rely heavily on fact-finding procedures. The results have implications for the management of relations between neighboring states with widely different influence in world affairs. In particular, they have lessons for the recently signed North American Free Trade Agreement (NAFTA), as they suggest ways to settle conflicts according to rule rather than gross power.[1]

A list of acronyms used in this article is provided on page 47.

Studies of international conflict negotiations often ignore the implementation of whatever compact might have been made. Ability to make relatively iron-bound commitments is vital to the success of an agreement. Canada and the United States have demonstrated this capacity in their relations with each other, but fears that Mexico may not be able to implement some provisions of NAFTA make its ratification problematic. Whether or not the parties to an agreement actually carry it out and the reasons why they do so make the process of dispute settlement an essential element of the accord.

Organizations like the two Canada-United States institutions mentioned above are intended to supervise a general agreement already negotiated and also to help settle disputes arising under it. To handle disagreements both of these systems are aimed at de-politicizing controversies within their realm by recourse to neutral judgement on the facts relevant to a dispute. Thereby they can avoid or remove a major element in conflicts within their jurisdiction. Ending the debate over the facts clears the way to some agreement on what to do about a given problem. The variety of methods these organizations pursue shows how trade or environmental agreements can be fleshed out to the satisfaction of disparate partners. How these methods might apply to NAFTA will be examined in the concluding section, where conditions underlying the agreements will be compared.

The IJC has had close to eighty years of experience, considerably altering its methods over time and changing its roles. The Canada-United States FTA has had about four years' experience, long enough to make at least preliminary judgments about its operations. Both have to reconcile domestic interests with international obligations. The two systems are organized quite differently. The IJC, composed of six members, three from each country, is a bilateral body separate from the two governments. In contrast, the senior trade ministers of the two governments make up the Free Trade Agreement commission. In both agreements the two parties have been careful to preserve their sovereign rights to make the final decisions. They cannot be forced to make use of

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either commission nor accept its recommendations. Neither arrangement touches on such basic sovereign concerns as defense, alliances, and arms control. Yet both deal with disputes in areas of increasing concern to each country as the distinction between high politics—national diplomacy and strategy—and welfare issues becomes blurred.

Since the two agreements register some common interest between the two countries, they suggest ways to cope with interdependence regardless of differences in power. The procedures represent only moderate restraints on unilateral action while offering profit through cooperation. Lacking power to enforce their conclusions, the two bilateral institutions depend instead upon sharing knowledge and information relevant to given disputes in order to prompt action by the appropriate authorities.

A Canada-United States organization usually looks to Americans like a bridge while to Canadians it appears to be a moat, remarks Charles Doran; though in both cases desired, the expectations may conflict.[2] Still, for the lesser power, the Canadians may turn proximity to advantage. In essence the procedures under the FTA as well as those of the IJC indicate ways of equalizing otherwise unequal powers. As a leading commentator on the Free Trade Agreement wrote, it "represents an attempt to manage conflict and resolve disputes arising from the exercise of national sovereignty by two highly interdependent and asymmetric economies while retaining the greatest possible degree of policy independence for both partners."[3] Parity in the organization of the bilateral systems is a *sine qua non* for the Canadians.

TWO DISPARATE ACTORS AND THEIR CONTROVERSIES

Asymmetries

Although Canada and the United States have the largest trade between them of any two countries in the world, and each is the most important customer of the other, Canada is much more vulnerable to barriers against bilateral exchanges. Well over 70 percent of Canada's trade is with the United States, compared to less than one quarter of America's trade going to Canada. Comparing their trade with each other to their respective gross national product (GNP), a similar disparity exists: Canada exports about 20 percent of its GNP to the United States, while United States exports to Canada represent less than 2 percent of its GNP. Total Canadian exports amount to about 31 percent of its GNP, which is somewhat less than the case of Germany but more than Japan. The comparable figure for the United States is around 10 percent.

In the political sphere, the federal government in Canada is much weaker with respect to the provinces than Washington is to the American states. The Canadian confederation is perennially threatened by fragmentation, aggravated by the never-ending pull of Quebec, one of the largest and richest of the provinces. But in one respect the Canadian government is less vulnerable: there is a great asymmetry in access for lobbyists. Due to the very openness of the American political system, Canadians have a greater chance to try to influence policy-making in the United States. Private American efforts to lobby in Canada are likely to be counterproductive because of the Canadian sensitivity to pressure from the United States.

Unlike Americans, usually quite ignorant of Canadian affairs unless personally involved and often insensitive to Canadian concerns, Canadians are constantly aware of their close relationship. Much more manpower and effort is put into governmental monitoring of bilateral contacts, and in consequence, those Canadians who deal with American officials are likely to be more knowledgeable about the subject and possess much longer historical memories. The enormous American administration faces a multitude of important foreign policy problems; relatively few officials concentrate on Canadian affairs and they often serve only a short time in relevant positions. Still, the mode of official contact across the border is usually informal and friendly compared to most other bilateral relationships elsewhere in the world. American officials, said one, believe that "with the Canadians the assumption is always that something can be worked out."[4]

Even with the best good will, however, differences in how policy is made in the two countries make accommodation difficult when controversies arise. Because of the looseness of the Canadian confederation, the federal government usually has to negotiate at length with the provincial governments before committing itself. On many matters of public policy the regions have very different interests and points of view. On the other hand, trade policy in Canada is much more concentrated in the executive branch of the national government, while in the United States Congress plays a very important role, often preventing the executive from proceeding in a liberal direction. Furthermore, Americans habitually resort to the judiciary to settle conflicts which in Canada would be dealt with administratively or by political negotiation. Americans, oblivious to the extent of domestic subsidies, tend to regard those openly extended by Canadian governments as unfair trade practices against which protection is appropriate.

Relieving potential friction on the national level, provincial and state officials are accustomed to dealing with each other on mutual

problems, sometimes formally in associations which cross the border, more often informally. The same is true at the local level. On the other hand, a controversy involving local interests on the Canadian side can rather readily rise to the federal level of concern as nationalist sentiment is aroused. The multitude of competing domestic interests on the American side, regardless of issue, has sometimes tempted the Canadian government to withhold a strong complaint in the expectation that the issue will be settled in Canada's favor by American pressure groups. The tendency of many Canadian officials to be more cautious and understated in expressing their view than the less deliberate Americans leads to misunderstandings. A potent source of controversy is the way members of Congress can make their own constituents' concerns a matter of national policy. Thus, politicization of a specific domestic interest is a constant threat to good relations between the North American neighbors.

Controversies

In matters of trade or the environment Canada, as the smaller power, has been the frequent claimant. What may be merely a domestic concern in the United States often becomes a foreign policy matter for Canada. Charges may be raised by the opposition party that the United States is being permitted to control some Canadian policy. In any case, import policy in both countries is producers' policy; consumer interests, which might balance some complaints, are less organized and vocal in Canada than in the United States.

Unlike security or diplomatic controversies, those dealt with by the IJC or FTA originate as private or local concerns in which actions by the other country may have an adverse effect. Usually the national governments are not immediately involved; Washington or Ottawa simply holds the ring and acts as guardian of private or local interests affected by activities in the other's country. The FTA's dispute settlement methods excluded the financial services. These were to be dealt with separately by the finance agencies of the two federal governments, presumably because they are bound up with government supervision of the national economy and thus go to the heart of sovereignty.

It is otherwise with trade and investment and with environmental issues. Buying and selling are particular activities which take place between specific individuals. They are not global abstractions, even though ideological considerations may enter into their control. Despite a public interest in environmental protection such disputes as may arise over inadequate sewage systems, toxic waste disposal, or flood control

and irrigation projects have their impact on particular groups of private citizens.

Unlike trade disputes, which are likely to result from immediate damage inflicted on some interests, a number of environmental controversies have to do with expectations of future harm. Such estimates are difficult to make convincingly. In all cases the more clarifying the light which can be focussed on them, the likelier a satisfactory settlement. Exactly what is the injury, who is responsible, and what are the possible remedies? Among other reasons for the importance of fact-finding, the national governments have to convince business or other interests, as well as Congress in the American case and the provinces in the Canadian case, that the dispute is being dealt with fairly. When the governments follow agreed-upon rules to lay down a factual basis, they can alter the perspectives of the participants to achieve some reconciliation.

GLOBAL AND HISTORICAL CONTEXTS

The mutual desire to seek accommodation arises in part from the common interests of Canada and the United States in the world. Both economies have been seriously threatened by the loss of competitiveness in global markets. The export of agricultural commodities, of primary importance to both countries, face governmental obstacles in other advanced countries. Both Canada and the United States must respond to the restructuring of the global economy, particularly because of Japan's ascendancy in the automobile industry and large-scale manufacturing in the newly-industrialized countries.

Given a desire to settle disagreements between the two countries, what choices did they have when diplomatic negotiations were inappropriate? Only occasionally have they resorted to such formal methods as appeals to the World Court or to arbitration. Informal methods are preferred. These include discussions between federal officials in one government with their counterparts in the other, carried on outside the diplomatic structure and often inside it as well as between individuals well acquainted with each other. Some problems are left to other agents; on a variety of border questions state and provincial officials deal with each other directly. There are also more formal cross-border associations of officials, including provincial premiers and state governors in a particular region. Even more informally, lobbying the other country's government sometimes helps to remove an irritation in company with domestic pressure groups, with drawbacks already mentioned.

On trade and investment questions each government has sometimes appealed to GATT procedures, an advantage to the claimant when

other members side with it. However, dissatisfaction with the dispute settlement procedures in this multilateral organization, addressed in the Uruguay Round, was one reason for the two governments resorting to their bilateral trade agreement. In Canadian-American relations the two North American governments have usually resorted to international rather than outside mediators of one kind or another before going to GATT.

To see why the two governments have sometimes chosen the route offered by the IJC or, more recently, the FTA, we need to note how the routes developed. The IJC, organized under the Boundary Waters Treaty, spent its earlier years carrying out a quasi-judicial function, *i.e.*, granting permission to applicants who wished to use, divert, or obstruct local waters shared by the two countries. For various reasons its arbitration powers under the treaty have never been exercised. However, the IJC gradually became more active in carrying out its investigative functions. These were on a much broader geographic and functional scale than those dealing with permits, but its earlier success in resolving disputes provided a favorable reputation for the newer activity. A primary function of the IJC today began with its investigations of the pollution of the Great Lakes. These studies laid the basis for the two governments' Great Lakes Water Quality Agreement of 1972, revised and expanded in 1978, and followed by a protocol in 1987. Responsibility for checking on the implementation of these agreements was a new and significant widening of the IJC's role. However, a few controversies became so politicized that the IJC, though helping to provide information on how they might be resolved, was not a major actor in their resolution. These included the agreements dealing with the famous Trail Smelter case in the early 1930s, as well as the development of the St. Lawrence Seaway in the 1950s and of the Columbia River in the early 1960s.[5] The more recent controversy over acid rain only peripherally involved the IJC until the two governments signed the Air Quality Accord in March of 1991 giving it new responsibilities.

The procedures under the FTA, unlike those of the IJC, are not the result of a formal treaty which would have to be ratified by the United States Senate. Preference for an almost equally formal executive agreement is one sign of changing times from the early years of the 20th century. For one thing, the Agreement recognizes the role of both houses of Congress in trade matters. Also, unlike the Boundary Waters Treaty, a relatively simple document of fourteen articles, occupying about eight pages of print, the FTA has twenty-one chapters (or articles), covering 40 typewritten pages plus annexes which together with the articles total 235 pages.

It is mainly Chapters 18 and 19 which concern us, as they deal with methods of dispute settlement. The immediately more important sections of the Agreement deal with the total removal of tariffs over periods of up to ten years. Other chapters cover general subjects, such as technical standards, or deal with specific types of exchange, including agriculture and energy. Despite the elaborate spelling-out of what was agreed upon, some controversial subjects had to be left to working groups for further negotiation over a specified period. One issue, concerning what subsidies could be legitimately met by countervailing duties because they distort trade, is generally regarded as the most critical controversy of all.

After over a century of false starts towards some kind of free trade arrangement the Canadian government took this politically risky step in 1985 after Prime Minister Brian Mulroney had won an overwhelming electoral victory. The United States government could not have initiated the proposal even had it wished, since the question was so controversial in Canada. After the Agreement had been concluded, opponents in Canada continued to be very vocal in denouncing the arrangement. Economists generally agree that the ultimate economic gains to Canada are likely to be greater than those to the United States, even though in both cases the economic impact is likely to be a relatively small proportion of their respective GNP.

The strongest advocate outside the Conservative government was big business. Nevertheless, the richest province, Ontario, unlike most of the others, opposed it. To make the Agreement more acceptable, the Canadian government insisted during the negotiations that "cultural industries" be explicitly excluded. In a most untraditional exercise of its powers, the Canadian Senate blocked ratification; this led to a hot national election in 1988 waged mainly over the Agreement. The Mulroney government won in re-election a close race. Both the New Democratic Party (with its socialist tinge) and the Liberal party opposed the Agreement.

In contrast, in the United States few but big business and border states took much interest in the negotiations. Although the Agreement had to go through Congress at the same time as the protectionist Omnibus Trade Act of 1988, it encountered smooth sailing. Faced with the deadline imposed by the fast-track Congressional acceptance procedure, the negotiators of the FTA wound up without all the issues being ironed out.

That many controversial questions remained to be answered makes the dispute settlement arrangements all the more significant. Furthermore, the procedures agreed upon, though novel, are not what the

Canadians originally sought. Other provisions of the Agreement have drawn more ire from opponents, but they have watched closely how the first cases have been settled under Chapters 18 and 19. This fact has not been lost on the Canadian government, which has regularly declared that "the Agreement is working" even when irked by some United States actions. Those conducting the cases have shown greater sensitivity than some parts of the Department of Commerce in their determination to make the Agreement work.

Some Canadian critics of the FTA would have preferred their government to expend all its efforts on improving GATT procedures, especially since a variety of practices engaged in by members, either unilaterally or "pluralaterally," have been undercutting GATT. Others have pointed out that by far the major part of Canada's trade is bilateral, and its voice in GATT is not one of the louder ones. The FTA offers a variety of ways to settle disputes, including a choice of going the GATT route. However, in the first years of the Agreement's implementation the two governments seemed to prefer the newer procedures for most disputes.

Those multilateral organizations which deal with environmental questions, particularly United Nations entities, tend towards the hortatory approach while seeking more specific agreement on particular practices. So far, they have mainly awakened interest in threats to the environment, exchanged information, and accepted the legitimacy of some general principles. One of these was already recognized in settling the Trail Smelter case in 1935, *i.e.*, that one country should not act in a way which would damage the environment of another. Over two decades earlier this principle appeared in Article 4 of the Boundary Waters Treaty, which states that such waters "shall not be polluted on either side to the injury of health or property on the other."

Some events of the 1980s have altered the background for the functioning of the IJC and FTA. A decline in the number of large construction projects on the border having a potentially adverse impact on the environment has provided fewer opportunities for IJC involvement; instead the Great Lakes Water Quality Agreement has become the principal focus of its work. At the same time domestic bureaus concerned about jurisdictional power have tended to limit resort to IJC procedures. On the other hand, trade disputes between the two countries have markedly increased, partly because of the growth in the United States' use of countervailing and anti-dumping duties to protect trade in a declining market. We should also note the proliferation of international organizations dealing with trade and the environment; the IJC and the FTA are just two among many channels for mutual adjust-

ment of national policies having an impact on the other North American neighbor. Including Mexico in a trilateral free trade agreement will also alter the variety of disputes.

NATIONAL OBJECTIVES

The IJC

What did the two governments seek when they chose IJC or FTA methods to resolve disputes between them? Official or semi-official statements give some clue of what they hoped to accomplish when they concluded these agreements. The Boundary Waters Treaty specifically recorded the desire to prevent disputes about using boundary waters and, besides settling current questions concerning interests along the common frontier, the parties declared that they wanted to provide for adjusting others as they arose. Although attention at first was concentrated on diversion of waters and navigation, concerns about pollution soon became more prominent. Further, Canadians, anxious as always about an American tendency to exploit their greater strength, sought legal restraints on unilateral action by Americans which could threaten their side of the border. Equal distribution of benefits from using common waters was another objective. The Canadians desired fixed and fair principles and eventually were able to convince the American negotiators that a general agreement would be preferable to settling each case on an ad hoc basis. As usual, the United States government curbed efforts to give the joint body organized to carry out the agreement the authority to act independently.

The FTA

In much greater detail than the Boundary Waters Treaty, the Free Trade Agreement spelled out the parties' mutual objectives. Nine aims were specified. Included in them were an expanded and secure market, clear and mutually advantageous rules to govern trade between them, and a predictable commercial environment for investment. The preamble also included the intention to strengthen the two countries' competitiveness in global markets, to contribute to expanding world trade, and to provide a stimulus to further international cooperation. The two most important Canadian objectives were more certain access to the American market than currently was assured, due to various United States protectionist moves, and a dispute settlement system which would exclude political influence. As a former premier of British

Columbia put it, Canadians viewed the United States' countervailing duty system as "a loaded gun which could aim at any industry at any time." Some progress in these two major objectives seemed necessary in order to sell the agreement to the Canadian public. Less publicly articulated, the Mulroney government had another objective: revitalizing the private sector by deregulating industry and reducing the government's role in the economy.[6] It publicly declared that the Agreement should expand markets by rationalizing Canadian industry and by taking advantage of the economies of scale.

A main United States aim was to reduce the impact of Canadian subsidy programs in order to create a "level playing field." Although the export market might not be greatly enlarged, this possibility remained attractive to the Americans in an era of negative trade balances. The very comprehensiveness of the Agreement reflected the Reagan administration's need to show both Congress and the business community that it was a fair deal by providing a balance among many interests. The subsidy issue was especially important to the United States government as it looked at the potential effects on third countries which also employed subsidies extensively.

While the Canadians eyed growing threats of exclusive trade blocs, the Americans were hoping for closer coordination of the two countries' trade policies. The two governments were united in desiring the elimination of tariffs and the reduction, in principle, of non-tariff barriers. The Americans, viewing the latest round of GATT negotiations, were especially eager to secure some rules governing trade in services, an objective shared by the Canadians. They also wanted better protection for intellectual property, of somewhat less interest to the Canadians. All these were reasons for concluding the Free Trade Agreement, and adapting practices to aims would certainly put pressure on the governments to use the procedures contained in the Agreement for settling inevitable disputes.

RESPONSIBILITIES FOR DISPUTE RESOLUTION

Under Chapter 19 of the FTA each government assumes an obligation to commence a procedure questioning the other government's application of countervailing duty or anti-dumping action when an aggrieved interest in its country makes a justifiable request. If consultation fails to settle the complaint, a panel is set up to ascertain whether rules of the government which have allegedly been incorrectly observed were followed in accordance with the law of that government. During

the first three years of the Agreement the governments chose to resort to formal panel review in only about 15 cases; others were handled through consultation. The governments set up panels under Chapter 18, dealing with alleged violations of the Agreement, for only a couple of cases. Otherwise, they preferred to continue consulting with each other and the interests involved. Apparently there was a joint desire to avoid confrontation and overloading of the system, and in any case working groups were expected to deal with some of the more contentious issues.

The two governments have had more discretion about referring a dispute to the IJC for investigation (leaving aside applications to approve certain activities on the boundary or transboundary waters). In asking the IJC to conduct an inquiry, the governments have already narrowed down the questions to be answered by a preliminary agreement on scope and terms. Nevertheless, the references have usually been flexible enough to give the IJC some scope for warning and prodding as well as investigating, while the commission still has been careful to remain within the bounds set by the reference to find the facts.

Once the IJC had been given its broader authority under the Great Lakes Water Quality Agreements, the commission began mobilizing cooperation among interested parties rather than concentrating on narrowly specific disputes between interests in the two countries. Under the Boundary Waters Treaty, investigations can cover "matters of difference between them (the parties) involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier." The IJC's investigations in recent decades have focused, in essence, on protecting or improving environmental quality of waterways they share. For example, the Poplar River Water Quality reference involved the potential impact of a proposed Saskatchewan coal-fired power plant on a cross-border river system spreading into Montana. Twice the IJC has been asked to examine how to preserve the structure and beauty of Niagara Falls. The IJC has received more than one reference to investigate the fluctuation of water levels in the Great Lakes and propose measures to manage the effect. Sometimes the IJC is asked to renew an inquiry into a subject earlier dealt with; air pollution in the Detroit-Windsor and Port Huron-Sarnia areas has been the subject of several references. A 1988 reference dealt with the emission of hazardous chemicals in general and in particular the Detroit municipal incinerator then under construction.

Under the Great Lakes Water Quality Agreements the IJC monitors, advises, and coordinates activities related to the Agreements. On its own initiative it can make and publish special reports as well as independently verify data various governments have submitted relative

to the Great Lakes. The 1987 protocol set time tables for implementing specific programs. It also addressed the problems of contaminated sediments, non-point sources of pollution, and atmospheric deposition of toxic pollutants. In line with its responsibilities the IJC has promoted and evaluated the drawing up of "remedial action plans" for forty-two environmentally-threatened sites in the Great Lakes region; these plans have been formulated by organizations at the local level, both public and private. In addition to intensified attention to toxic wastes the IJC has turned to a new threat to the Great Lakes: the introduction by ocean-going ships of exotic species into the water. These include the fast-spreading zebra mussel which, among other menaces, clogs the intake pipes conveying lake water to cities and industrial plants.

Even prior to the Great Lakes Water Quality Agreement of 1972, the IJC carried out other monitoring duties. In 1966 it was authorized to maintain surveillance of air quality along the whole border. The 1991 Air Quality Accord, ending the long controversy over acid rain, directed the IJC to hold public hearings on progress in resolving transborder air pollution problems, to be followed by reports to the governments. It is also to be used for settling disputes under the agreement.

The FTA also focuses on fact-finding, but the approach is quite different. The Agreement enjoins the commission to seek a "mutually satisfactory resolution" first through consultation, resorting to outside panels only when unable to agree. When a panel is set up under Chapter 19, dealing with countervailing duties and anti-dumping, its decision is binding on the government implicated in the complaint. Meanwhile, if a party amends its anti-dumping or countervailing duty law, application of this amendment to the other party must be specifically indicated. If the other party is dissatisfied it can call for a panel to render a declaratory opinion regarding conformity of the amendment with the Agreement or with GATT. It is the practices, not the law, which can be disputed, as noted earlier. The laws themselves are the subject of the working group set up to study and recommend agreed-upon changes; to do so it was given five to seven years from the Agreement's entering into force.

When cases under Chapter 18, dealing with measures either actual or proposed by one party which the other believes to be contrary to the FTA, have not been resolved by consultation within a brief period acceptable to both, they may be referred to binding arbitration or to a panel of experts chosen from prearranged rosters. However, those cases dealing with safeguard actions, under Chapter 11, must be arbitrated. When the panel route is chosen, the final report, following fairly elaborate procedures to ensure that all interests are heard, is submitted to the commission. It is normally expected to accept the report as the basis for

resolving the dispute, including recommendations for appropriate action. Quite rigid and detailed time tables must be observed.

Although covering a very wide range of potential conflicts, the FTA by no means embraces all forms of exchange between the two countries. Besides excluding financial services and "cultural industries," the negotiations also explicitly left out some other kinds of business, including beer (but not wine) and certain quantitative restrictions on sugar, poultry, and eggs. After the original draft had been signed, the United States merchant marine lobby in Congress managed to secure removal of the provisions dealing with transportation. In addition, a number of protective measures were "grandfathered."[7]

While FTA authorities deal primarily with technical questions of a legal and fiscal nature, and the IJC with technical matters relating to engineering and public health, in both jurisdictions the dispute is about a particular case rather than a general policy or practice. Those conducting the investigations are not empowered to inquire into broad policy matters, whether about environmental protection or expanding trade. But the FTA does authorize the commission "to oversee its further elaboration, and to consider any other matter that may affect its operation." "Consultation" does not include diplomatic negotiation, usually involving bargaining over the exchange of concessions. While neither the IJC nor FTA has regulatory functions, their investigations could provide some factual basis for rule-making and/or negotiating new agreements. Charged with the responsibility of settling particular disputes, both the IJC and FTA are essentially responders. The coordinating functions of the IJC under the Great Lakes Water Quality Agreements appear to be missing in the case of the FTA. Still, the latter contains other provisions with broader implications, including the promise by each party to give prior notice to the other when undertaking some measure which may adversely affect the rights of the other under the Agreement. Furthermore, the resolution of disputes usually involves further consultations to avoid continuing disagreement.

Whether the case engages the FTA or the IJC, they are to solve a problem recognized by both governments. The problems to be solved demand special ingenuity when the most obvious solution would give everything to one side; how to avoid a zero-sum game is not always apparent. The actions of both the IJC and the FTA suggest that finding a path on which both parties gain something is also envisaged as a responsibility, even though an explicit bargain is not possible. The tasks set for both commissions are neither diplomatic nor judicial, but something in between. Carrying out these responsibilities has required special kinds of organization.

BILATERAL INSTRUMENTS

As a former Canadian member of the IJC once put it, members of that commission act "not as delegates striving for national advantage under instruction from their respective governments, but as members of a single body."[8] A former American joint chairman of long standing believed so strongly in the independence of this body that he would not permit separate meetings of the American members nor contacts with the Department of State. Investigating and monitoring boards under the IJC are "joint." When officials from national administrative agencies are chosen to be members of boards they are recruited in their capacity as experts, not as representatives.

This IJC pattern of a free-standing body was rejected when the two governments negotiated the FTA. Instead the United States trade representative, within the Executive Office of the President, and the Canadian minister for international trade became the commission. Other members are chosen on an *ad hoc* basis, depending on the issue. Thus, the commission is organized to perform both the function of negotiating and of arranging for a kind of third-party dispute settlement.[9] The FTA arrangement ensured that the commission's activities would be firmly tied to national decision-making. However, when disputes were to be referred to panels under Chapters 18 and 19, the members of the panels, which are joint, could not be officials in either government. Chapter 18 panelists, in the words of the Agreement, "shall not be affiliated with or take instructions from either Party." Chapter 19 has similar restrictions on its panelists.

Unlike the FTA, the three Canadian members of the IJC are likely to come from different regions and sometimes are ex-members of a government agency. The American members usually have had some political party connection, and their nomination by the president now has to be approved by the Senate. In pre-World War II times appointment sometimes went to party hacks; in recent years a member is more likely to have some interest in environmental matters. Occasionally, as during the Reagan administration, there have been one or two vacancies left for a considerable period. Otherwise, the IJC is not much affected by changes in the United States presidency despite replacements on the commission.

Staffing

Neither the IJC nor the Free Trade Commission arrangements for a secretariat are joint; each government maintains its own small office to serve the commission. But there is constant communication between the

two staffs and much sharing of responsibilities. The IJC also maintains a regional office in Windsor, Ontario, jointly financed and staffed for implementing its Great Lakes Water Quality Act duties. The secretariat for the American side of the Canada-United States trade commission is located in the International Trade Administration of the Department of Commerce, and no more than ten employees were intended. The Canadian side is served by a small office within the United States branch of the Department of External Affairs and International Trade. The secretariats are specifically excluded from taking any substantive role in the working of the panels. Among their duties they are to ensure that each government is fully informed by the other of actions taken under the Agreement. Both the United States and Canada clearly wished to avoid creating any more bureaucratic structure than was absolutely necessary to carry out the treaty.

Perhaps reflecting the greater importance the Canadian government places on both the IJC and the FTA, it has provided a larger staff in each instance than the 15-member American section. For the IJC this means that much of the joint work such as drafting has been performed by the Canadian staff. For the American side's administration of the Free Trade Agreement, staffing in the Office of the United States Trade Representative (USTR) is very "lean" in view of its diverse duties. Consequently it is overworked in carrying out its many responsibilities, which include providing counsel, maintaining daily contact with the Canadian Embassy, and finding people for panels and working groups. These are only some of the many foreign trade functions the office must perform in other forums as well. With the secretariat in the Department of Commerce and the use of inter-agency groups, the American side is much more dispersed than is the larger, more focussed Canadian administrative structure for the FTA. Because the Canadian government is so much smaller, its officials in any case are much more likely to be personally familiar with each other, a difference which characterizes almost all governmental relations between the two governments. In a way, these organizational differences replicate the manner in which the Agreement was earlier negotiated.

Panels

Less difference exists between American and Canadian practice in choosing individuals to serve on the investigating boards appointed by (1) the IJC and (2) the panels chosen for settling disputes under the Free Trade Agreement. However, these two systems do vary regarding the qualifications for service on their various boards and commissions or panels.

As indicated earlier, the expertise of most of the membership of the IJC investigating and monitoring boards derives from their positions in the operating agencies from which they have been recruited on a temporary basis. On the American side, they might be specialists from the Army Corps of Engineers, the Environmental Protection Agency, National Oceanic and Atmospheric Administration, or the Department of Agriculture. Others would come from similar agencies in states which border the area involved in an investigation. A few experts from outside government, such as universities, occasionally might be chosen. Earlier investigations depended heavily on engineers for expertise, but as later references having to do with pollution problems became more prominent, other types of experts were necessary. For example, the Garrison Diversion case dealt with the potential exchange of biota into Canadian waters, hitherto free of undesirable species, if an irrigation project altering the flow of the upper reaches of the Missouri River in North Dakota was to be carried out. Thus, the IJC had to draw upon various kinds of scientists such as biologists. Whatever the case, the individuals on investigating and monitoring boards would have opposite numbers from Canada on the same board, whether from the federal government or the provinces concerned. For particular investigations it has not been uncommon for those serving earlier to act in a similar capacity in a later task or at least to advise on staffing it. Despite continuing fears, for the most part the potential conflict of interest has not been evident when an official comes from an agency directly involved in the problem to be investigated. Professionalism seems to be the guiding principle. Among advantages in staffing investigations in this fashion, two are often cited. Personal acquaintance with officials having similar responsibilities on the other side of the border encourages cooperation. Within the agencies from which they are selected, increasing awareness of what is happening on the boundary and across it helps to prevent unwitting injury.

Under the FTA the panels consist of five members, two chosen by each member of the commission, which then picks a fifth member to be chairman. (Chapters 18 and 19 also provide that if the commission cannot agree on the chairman the four panelists make the choice.) Non-governmental, they are drawn from rosters selected by each government for its nominees after consultation between the parties. The roster choices under Chapter 18 are to be selected "strictly on the basis of objectivity, reliability, and sound judgement, and where appropriate, have expertise in the particular matter under consideration." Chapter 19 requires that the candidates "be of good character, high standing and repute, and shall be chosen strictly on the basis of objectivity, reliability, sound judgement, and general familiarity with international trade law."

A majority on each Chapter 19 panel "shall be lawyers in good standing." On the American side, the USTR appoints its roster annually, after advice from an interagency committee and consultation with the House of Representatives Ways and Means Committee and the Senate Finance Committee. A similar procedure is followed for the Chapter 18 roster. Since the panelists have to tackle very technical legal questions, trade lawyers have predominated in both, but there have been other professions among those chosen for Chapter 18 panels.

The Office of the United States Trade Representative has sought individuals not connected with any particular industry or policy advocacy. People of some prominence in the field have been selected; when certain notables appeared on the Canadian roster who had been active during the negotiation of the Agreement, opponents raised some doubts about their qualifications.[10] Others are ex-officials from relevant agencies. The Canadian roster for Chapter 18 has contained more non-lawyers, including economists and other academic experts, than the American, where lawyers predominate. However, the panel selected for the Chapter 18 dispute over the United States ban on lobsters below a certain size included two university professors on the American side and was chaired by a former senior adviser to the United States Trade Representative.[11] Although the American roster for Chapter 19 contains names from all over the country, individuals in the Washington area predominate; convenience might be the explanation. Compared to the panelists, a much wider variety of specialists form the membership of standing committees and the working groups charged with resolving general differences in national trade policy. The two heads of the most important working group, that dealing with subsidies, are very experienced trade officials. The Free Trade Agreement confers authority on the commission to seek expert advice from outside government in addition to establishing *ad hoc* and standing committees to examine specific technical questions, such as harmonization of customs rules.

Funding

In line with each government's desire to retain as much administrative control as feasible, funding for both the IJC and FTA activities is budgeted separately for that country's section. The IJC's appropriations come through the Department of State. Small and non-controversial, the IJC enjoys both advantages and disadvantages from this procedure. Despite added responsibilities in recent years, the commission has suffered from the frugality of the State Department, which has interpreted IJC staff "needs" more narrowly even prior to the general budgetary crisis of the late 1980s. According to a study made by the General

Accounting Office in 1989, an earlier recommendation that the IJC be provided funds for its own research (by its boards) was turned down since "the State Department believed it would undercut effective U.S. technical review and cost-effective management of funds, because State was not in a position independently to administer or control all the technical aspects of IJC activities."[12] Still, the commission was able to augment its staff slightly and to secure funds for start-up activities even when new references were made to it at the "wrong" time in the budget cycle. In any case, the financial requirements of the IJC are relatively small since the salaries of many government officials working on its boards are budgeted through their own agencies. Under the Canadian system, the ability of the Treasury to shift funds allows for greater flexibility on that side of the border.

Since those responsible for carrying out the FTA are also officials of either the United States Trade Representative's office or of the Department of Commerce, they are financed accordingly. Funds to pay the United States' share of dispute settlement proceedings and for the expenses of the panels under Chapters 18 and 19 are appropriated to the USTR and to the secretariat respectively. The USTR is authorized to transfer such money to another United States agency to pay for panel expenses, in practice the Department of Commerce. The act implementing the Agreement set a cap of $5 million for the secretariat.

Attracting Attention

Do these budgetary procedures induce operating agencies in the two countries to take note of IJC and FTA fact-findings? Since the activities of the IJC and the FTA on the American side are financed through the budgets of regular departments, some coordination should occur with agencies having related interests, or at least cause other officials to recognize the concerns of these commissions. The IJC's budgetary dependence on the Department of State has some disadvantages in competition with the department's own agencies. A more certain way of ensuring that its recommendations are considered by the decision-makers is through its use of officials from responsible agencies, as described earlier. With respect to the FTA, settling disputes piecemeal by means of panels for specific cases does not have immediate relevance for policy making. Yet, decisions made by panels under Chapter 19 are enforceable in a court of law. On other aspects of the FTA the USTR makes regular use of inter-agency committees, a common practice throughout the federal government to promote coordination in the huge and widely dispersed decision-making structure. (Since 1987, under the protocol to the Great Lakes Water Quality Agreement, inter-agency

committees have also dealt with relevant IJC recommendations.) The use of committees from related departments during the negotiations for the FTA alerted government agencies whose interests were involved in the Agreement to become aware of its subsequent development. One drawback to depending on inter-agency committees or loaned members from operating agencies is the rapid turnover of personnel. Individuals tend to move from one position to another fairly frequently, thus detracting from continuity through personal acquaintance, and their careers depend primarily on service within their own agency, not on temporary assignments elsewhere.

Because of the much smaller size and integrated organization of the Canadian federal government, together with the combined Department of External Affairs and International Trade, coordination at the federal level presents fewer problems in that country. But difficulties arise from relations between the federal government and the provinces which will be considered below.[13]

While borrowing officials from operating agencies, budgeting through a regular department, and using inter-agency committees may be of help in implementing recommendations of the IJC and/or FTA, there can be obstacles. Turf jealousy is ubiquitous. Agencies which are short of funds may be reluctant to loan their personnel for IJC activities. On the other hand, they are also reluctant to be absent during fact-finding. Although the State Department might impose budgetary restraints on the IJC, on occasion it has aided the Commission in the latter's dealings with the Environmental Protection Agency. Still, the State Department (like External Affairs) has been watchful that the IJC does not exceed its mandate, thereby weakening a negotiating position.[14]

As for trade, the Department of State no longer plays the dominant role, while that of other departments and agencies has increased. Since the USTR has the responsibility for supervising the implementation of the FTA, its location in the Executive Office should promote coordination. Yet in the last analysis it is the personal relationships which usually triumph over organizational lines of responsibility on paper.

Levels of Government

Quite another matter is the allocation of responsibility between the central governments and their respective state or provincial governments; federal tensions raise the problem of carrying out agreements made by the national government which involve other levels as well. The IJC practice of employing state and provincial officials as well as federal personnel on its investigating and monitoring boards is one solution to this difficulty. The FTA raises special difficulties in such

matters as "national treatment" for government procurement; preferences given to a state's own enterprises constitute serious non-tariff barriers. Similarly, making the two countries' technical standards "compatible" is very complicated. The central governments can only ensure national efforts while keeping each other informed of the number of subordinate governments which have their own standards.

The federal government in Canada, confronted with the very large jurisdictional authority of the provinces in may areas touched upon by the FTA, has tried to solve some of the conflicts by extensive consultation with provincial governments. Canada's constitution lacks the equivalent of the interstate commerce clause of the United States constitution. Canadian officials on the national level have hoped that the FTA may help to reduce the numerous interprovincial trade barriers, but this requires patient negotiation or even constitutional amendment. For instance, Ontario, the most powerful province, temporarily resisted the FTA's provisions removing barriers to imported wine, highly protected in that province. Discrimination by several provinces against beer produced by enterprises outside their own boundaries has been a perennial irritant in Canadian-American trade relations, unresolved even by a GATT panel decision or balanced by Canada's counterclaim against higher taxes on imported beer imposed by some American states.

The semi-annual formal meetings of both the IJC and the Free Trade Commission provide opportunities not only to decide on recommendations but also to review past action. Thus, one side can express its views on how the other is progressing in carrying out any specific agreement and work towards an understanding of impediments in doing so. Even more effective are informal meetings of these two groups and their staff. In the trade area technical standards are a frequent source of dispute as concealed trade protection; these are supposed eventually to be harmonized by working groups in various regulatory fields, including agriculture. In monitoring accords, the IJC can press the appropriate authorities to act by pinpointing problems.

PROCEDURES FOR SETTLING DISPUTES

Geared for action, how do the IJC and FTA go about their duties when disputes arise? While regular consultation, working groups to propose common standards, and cooperative studies to improve joint enterprises are important means of resolving controversies between the two neighbors, this study concentrates on fact-finding; this is a distinc-

tive way the two institutions try to arrive at a mutual understanding of the elements underlying specific cases. Since their procedures differ, those employed by the IJC will be considered first.

The IJC

When a controversial development affecting water and/or air along the border is referred to the IJC, a process begins which builds consensus from the ground up. Various subcommittees for the investigating boards, all of them appointed to seek answers to specific questions, begin their studies. To give one example, the Flathead River case involved potential harm to pristine rivers south of the border in wilderness areas of Montana if a proposed coal mine were to open nearby in British Columbia. The Flathead River International Study Board was established, and it then appointed technical committees, a special subcommittee and a task force. These in turn examined in detail a number of very technical biological and engineering problems as well as socio-economic questions.[15] In this, as in other cases, the IJC organized public hearings in the affected locality to receive further input at various stages in the investigation. In all such cases, the reports of the subcommittees have gone up the ladder to be approved by the next level until they reached the commission itself. Again there have been public hearings at the time of the preliminary reports and when the final report was published. All stages involved participants from both sides of the border. If they believed it desirable, the IJC would send back down the line for further information. Frequently, they have sought ways to mitigate ill effects or suggested alternatives to a course of action which research revealed to be harmful. Doing so helped to produce the consensus necessary for the final report. The IJC does not reach its decisions by voting.

The final report may form the basis for further negotiations as well as settling the immediate disagreement. Even though the IJC does not follow the doctrine of *stare decisis*, the members are not precluded from considering earlier experiences if they are relevant and can offer clues to possible solutions. At each stage in the proceedings the result is a single (joint) report.

The FTA

A long-standing complaint about IJC procedures is that they take too long; some disputants become impatient. Fear of lengthy proceedings keeps some disputes from being referred to the IJC. During a long investigation, the issue may become politicized as interested parties take matters into their own hands. On the other hand, there are advantages

in dragging out proceedings which on occasion can permit an informal resolution simply through obsolescence.

When the FTA was being drafted, the negotiators wanted to avoid the IJC's lengthy proceedings as well as those in GATT and thus included many rigid timetables for various steps. Such time limitations could also protect interests in one country which allege injury by administrative action in the other, *e.g.*, application of an anti-dumping duty, where prolonged delay would cause harm. Although the rule of *stare decisis* is also absent from the FTA procedures and the panels are supposed to be oriented toward practical, commercial policy "rather than the fine points of law," the rules guidi. .g the panels are similar to those in administrative law proceedings. The testimony of witnesses, briefs, types of evidence, and the like resemble more judicial proceedings, at least in Chapter 19 cases. This is to be expected, since such panels are re-examining actions whose appropriateness is in question. Panels look at questions of scope and evidence. They scrutinize the voluminous administrative record, memoranda, conferences, hearings, and meetings pertinent to the original administrative decision in dispute.

Two early Chapter 19 cases, one favoring the United States and the other favoring Canada, illustrate the work of the panels. In the first, the United States justified imposing a countervailing duty on new steel rail from Canada by alleging unfair and injurious government subsidies. The panel first remanded the administrative decision to the (United States) International Trade Administration (ITA) for re-consideration of how subsidies to the industry were determined, and then accepted its conclusion that on the "best information available" the effect was threatening American competitors substantially.[16] In the case of Canadian bulk red raspberries imported into the United States, the panel first found that the ITA had correctly classified what kind of import was involved, but then sent the case back to find a better way to establish the value of the imports. The Department of Commerce then dropped the anti-dumping duties on this fruit.[17] Chapter 19 panel reviews "shall be limited to the allegations of error of fact or law, including the jurisdiction of the investigating authority."[18]

Chapters 18 and 19 of the Agreement both require that panel proceedings be confidential. Unlike the wide publicity sought in IJC cases, there are no public hearings. Rules are elaborate in providing for secrecy, particularly to protect proprietary information in Chapter 19 cases. Panels are not to reveal their deliberations, and only members can be present. Nevertheless, transparency is promoted by examining how a national administrative agency made its decision, which might otherwise be unknown to the interested public. At various stages in panel

proceedings the two governments must allow the parties immediately involved to present their case.

As a Chapter 18 panel approaches its decision, it provides the two governments with a preliminary report on findings of fact, its view of whether the contested action is consistent with the Agreement, and possible recommendations; the parties can then comment on these prior to the final report. If the parties agree, the panel can also examine the amount of adverse trade effect of a measure found inconsistent with the Free Trade Agreement. Chapter 19 review panels "shall issue a written decision with reasons, together with any dissenting or concurring opinions of the panelists...." A preliminary report and comments are also included. Dissenting opinions similarly are allowed in Chapter 18 cases.[19]

Although the FTA, unlike the IJC, provides for only limited publicity, interested parties have been assured their day in court. Yet the methods used are less adversarial than judicial proceedings and allow for recommended alternatives based on the facts found. In practice, those engaged in the proceedings of both the IJC and the FTA have exhibited a cooperative attitude. This can be seen in the efforts to find some benefit for both sides when recommendations are made.

ASSESSING EFFECTIVENESS

Outcomes

What is the result of the methods employed by the IJC and under the FTA? For the kind of disputes examined here, pin-pointing the consequences presents problems. A definitive end to the controversy seldom occurs; the immediate outcome may be primarily diminished friction. The long-run effects can mostly be surmised. Even material results, such as water quality, are not easy to calculate, while judgments on the political and economic effects are likely to be conjectures. Cause and effect are related in complicated ways. Separating the results attributable to settling disputes from other aspects of the FTA or Boundary Waters Treaty is difficult; other factors may have influenced the outcome. For example, unfavorable economic conditions may account principally for abandoning some project adversely viewed by the IJC. Trade between Canada and the United States has markedly increased since the FTA was signed, but there were multiple reasons for this rise. To determine who got what is even harder to specify.[20] Despite these problems, some judgments can be made. Did the system of fact-finding help the governments to achieve some objective they had sought? Were the recommendations of the investigators implemented? Were the

governments sufficiently satisfied with the results to want to continue the system?

Neutrality, as between the two states' interests, is a prime aim in both the IJC and FTA arrangements for deciding on the facts. Great efforts have been expended to assure this, and the IJC decisions over the decades have reassured the governments that this has been achieved. A crucial test of neutrality in the system for settling disputes under the FTA occurred in the spring of 1991 when the first "extraordinary challenge" panel under Chapter 19 was instituted at the United States' request. It did so as a result of pressure from the National Pork Producers Council. The members were unhappy about an adverse determination of a Free Trade panel investigating a 1989 International Trade Commission (ITC) decision. The American agency had decided that imports of Canadian fresh, chilled, and frozen pork were threatening to injure American pork producers due to Canadian subsidies provided live swine producers and had imposed a countervailing duty. The original case was remanded to the ITC and more than one Free Trade panel dealt with it, each time asking for better evidence to support the ITC decision. In February of 1991, the International Trade Commission eventually determined that no material injury had actually occurred, or was threatened, to the American pork industry. Not reconciled, the pork producers sought Congressional help to overturn this decision. The appeal occurred while the Administration was asking Congress to extend the fast-track authority for the free trade negotiations with Mexico and an extension for those in GATT. When the USTR called for an extraordinary challenge panel, the Canadians indignantly claimed that to do so was an inappropriate use of this form of appeal. According to the Agreement, they said, such a panel was to be set up only if the original panel's action threatened the integrity of the process because a panel member was guilty of violating the rules or had exceeded its authority. Nevertheless, the Canadians were eventually pleased when the three-judge panel ruled that the procedures followed by the panels were correct. The United States was required to pay back more than $20 million in duties collected.[21]

Another objective of each government was to have its interests taken into account in the other member's decision-making; the very existence of a system of dispute settlement offered an opportunity to avoid being a helpless victim of governmental actions in the neighboring country. Free trade cases in which the Canadian side prevailed indicate that the opportunity is being used. In the very complicated resolution of the Garrison Diversion controversy the Canadian government was only one among many participants, but it was present through the IJC investigation which followed failure of its diplomatic pressure.

Having a routine way to settle disputes has also promoted predictability, another objective of the parties to the agreements. Arbitrary administrative actions are less likely to occur in environmental areas than in those involving trade. Still, the long history of successfully settling boundary environmental disputes has given each national government confidence that it has a way to protect itself against a potentially harmful action by the other along the border. As for trade disputes, simply having a system in place is reassuring.[22] Not enough time has elapsed to judge whether allegedly capricious "fair trade" actions by the United States agencies (as opposed to differing interpretations of principle) have disappeared.[23] Yet, the ready use of the dispute panels suggests that the system could curb frivolous appeals by American trade competitors. Furthermore, Chapter 19 panels have carefully scrutinized administrative records, thus reducing the chance of trade agency error.

More difficult for Canadians to guard against than arbitrary American administrative action is Congressional behavior. For example, a legislative rider contrary to Canadian interests may inadvertently be slipped in at the last minute in a joint conference session preparing a bill. The FTA contains provisions guarding against legislative action contrary to the Agreement's intent. For example, a Chapter 18 panel examined the Canadian charge that the Agreement was violated by a Congressional act restricting the import of lobsters to a size about an inch longer than the Canadian limit on legal size lobsters. The American claim that this was a conservation measure, not protectionist and contrary to the FTA, was eventually upheld by the panel. However, the controversy continued through other procedures, further consultations with interested parties, and compromise proposals.[24]

The proceedings about lobster size were unusually lengthy because the controversy was a political issue in Canada. Other disputes have been settled much more speedily, in line with the intent and terms of the FTA, and to the satisfaction of the participants as to time involved. For Chapter 19 disputes the negotiators' objective to avoid the drawn-out procedures of the IJC and GATT has so far been carried out. (An exception was the extraordinary challenge following the decision on Canadian pork exports.)

What happens to the recommendations of the IJC investigations and free trade panels? Implementation has depended on a number of conditions. Some of them were noted in a General Accounting Office report requested by Senator John Glenn "reassessing" United States participation in the IJC. Without classifying them, the study found that 52 percent of the 56 recommendations in the three most recent biennial reports had been implemented, 36 percent had not, 4 percent had been

partially implemented, and the IJC and United States agencies disagreed on whether the remaining 5 percent had been carried out. Concentrating on those dealing with the IJC's role in the Great Lakes Water Quality Agreements, the report did categorize some kinds of recommendations; *e.g.*, those on toxic waste disposal and coordination between state and federal governments.[25] Many of the recommendations enumerated came out of investigations which were the result of general references for the IJC, not because of a dispute. Nevertheless, in explaining the outcomes, the report did point up the fundamental problems of responsibility and attentiveness.

The IJC cannot carry out its recommendations independent of the member governments, but its monitoring boards, where they exist, furnish authoritative guidance and impetus for administering agencies. On the United States side, the IJC formally reports to the Department of State, although the General Accounting Office report found this agency less than fully responsive. With world-wide foreign policy concerns its attention is not easy to secure. However, at the regular meetings of the United States Secretary of State with Canada's Secretary of State for External Affairs, questions about IJC activities are bound to arise, thus requiring preparatory information. Most of the IJC's recommendations go from the Department of State to the EPA, an organization with its own priorities. With respect to the Great Lakes Water Quality recommendations, the protocol of 1987 requires the EPA to make a biennial progress report to the IJC. Remedial action plans around the Great Lakes are included, and a schedule is laid down. The first IJC report on the governments' actions in carrying out the 1991 Air Quality Accord was due in March of 1992.

Informally, officials from operating agencies who participate in the IJC investigating boards and commissions are likely to alert their own organizations to recommendations to which they contributed. Senator Glenn's request for a study of action on IJC recommendations suggests that the interest of a member of Congress can be helpful in calling attention to the work of the Commission.

The General Accounting Office report did not cover some of the results of the IJC studies, which are hard to measure. But observers agree that pollution in the Great Lakes has been significantly lessened, and despite the need for further tasks to be undertaken, the waters are noticeably clearer. Similarly, on a smaller scale the water quality of the St. Croix River basin (shared by Maine and New Brunswick) has sufficiently improved so that salmon have been restored. As the result of IJC proposals, flooding of the Skagit River into British Columbia to supply power to Seattle did not take place, and electricity was made available by

another means. The IJC report recommending against carrying out the Garrison Diversion of the Missouri River in North Dakota was only one of several reasons why this project in its original form was abandoned. Still, the IJC's negative recommendations were a strong argument used effectively by the opponents.

Unlike the work of the IJC, actions under the FTA have had little trouble attracting attention, especially in Canada. Members of the Canadian Parliament have strong political reasons for watching developments. Questions have been asked in the House of Commons and reports made also by the Senate. In the United States, trade matters are a perennial concern to members of Congress. The act implementing the FTA provides for surveillance by the Senate Finance Committee and the House of Representatives Ways and Means Committee. Other committees have held hearings on various aspects of the Agreement, and the annual meetings of the Canada-United States Interparliamentary Group take note of activities under it.[26] Under the authorizing act the president must make a biennial report on how the Free Trade Agreement is working out. Although the two principal members of the FTA commission are politically-appointed cabinet officials rather than administrators of operating agencies, they consult with each other regularly about how the Agreement is being implemented and are highly influential supervisors. Furthermore, top officials in the USTR are not infrequently called to testify at Congressional committee hearings. In March of 1992, the USTR organized an interagency committee to help monitor trade disputes headed by the deputy assistant for North American affairs.

Some investigations, whether under the IJC or the FTA, are dropped before conclusions are formally reached. However, they show that an effort was made, which is occasionally at least as useful an outcome as reaching a decision when the pressure to do something is stronger than the likelihood of success. On other occasions, conducting lengthy proceedings to find the facts may delay action until those conditions have changed which had made a dispute difficult to settle earlier.

Obstacles

What are the obstacles to implementation? In addition to inattentiveness, they include other conditions already mentioned. Impediments have been operating agencies' anxiety about encroachments on their jurisdiction, lack of funds, and state and provincial powers limiting the authority of federal governments. For the IJC, which is not part of either government, sanctions for non-performance would be ruled out even if desired. The FTA contains provisions for last-resort enforcement. But they are either too extreme (such as withdrawal from the Agreement)

or involve retaliation. This type of negative reciprocity has usually been avoided in Canadian-American relations.[27] Such an intricate and thickly interwoven network binds the two nations together that an action which would adversely affect Canadians is often likely to hurt significant groups of Americans as well. In any case, to find a retaliatory measure which was "equivalent" to the injury would be difficult. While most of the Chapter 19 disputes have involved United States administrative actions, which are far more numerous than similar moves in Canada, the Canadian government is inhibited from increasing its "contingency protection" to mirror United States practice because its government subsidies system is already much more extensive than the American. The pot may be "blacker" than the kettle.

On the other hand, a mutual tradition for rule observance pulls both the American and Canadian governments towards abiding by recommendations in the investigations. The losing side has often referred to this attribute. The governments are the readier to implement a decision the more specific its terms. American trade officials expressed some disappointment about the slowness with which the Canadian government carried out the salmon and herring decision, which involved a complicated resolution. They would have preferred a more clear-cut determination. (The panel concluded that the requirement that all such fish caught in Canadian waters be landed for processing in British Columbia was indeed trade-distorting, but it accepted the alleged need for conservation data collecting and thus proposed a system of percentages of catch which would have to be landed in Canada before sale.)[28] This was an early test of Chapter 18, and the complicated decisions appeared necessary to reassure Canadians nervous about the precedent-breaking FTA.

As for panel experience under Chapter 19, Canadian officials have expressed satisfaction with the implementation because it forces a government to act when it might otherwise do nothing about an alleged administrative error. In the case of IJC investigations, pressure on governments to comply is often effectively exercised by transnational groups supporting IJC recommendations.

Beneficiaries

Aside from the more general benefits obtained by the two national governments, what can be said about specific interests which gained from the settling of various types of disputes? The creative compromise favored by the IJC has been increasingly difficult to propose when the potential victims of pollution are almost all on the other side of the border from its origin, as was the case in the Garrison Diversion controversy.

For this reason, it has been useful to combine air pollution problems in the Detroit-Windsor region with the Port Huron-Sarnia region, since the main sources in the two areas were on opposite sides of the border. Because IJC investigations to protect air and water quality deal with the origins of pollution, losers are likely to be those found responsible for the harmful emissions. For example, dealing with eutrophication of the Great Lakes by eliminating phosphorous loadings required adjustments by phosphate industries. When the IJC has been asked to deal with water levels in the Great Lakes the physical possibilities of affecting them are limited or unknown. But at least as difficult is the prospective conflict between riparian property owners and navigation and power interests, although these do not divide by national borders.

As for the FTA, its provisions are couched in terms of the interests of importers and exporters; the consumer is ignored except insofar as lower trade barriers mean lower prices. The disputes so far handled by panel investigations have involved very narrowly-defined interests, such as the manufacturers of parts of paving equipment. Panel inquiries were more likely to be concerned with maintaining price levels in the face of "unfair competition" than with lowering them in the interests of ultimate consumers.

Preventing disputes from occurring or becoming politicized is as helpful as settling them once they arise. Increasingly, this has been the function of the IJC respecting its Great Lakes duties. The remedial action plans which it promotes involve all the local interests which can constructively cooperate to improve the air and water quality of their community, helping thereby to avoid future conflict. Continuous consultation by members of the IJC boards has also aided in reducing acrimony.

Similarly, regular consultation by FTA officials can lessen the likelihood of bitter confrontations based on ignorance of the situation. But reducing the greatest source of conflict—differences of legitimate subsidies—must await the completion of negotiations on a code. Meanwhile, the working group deferred action until the GATT negotiations on this subject have ended. Currently each case is investigated on its own terms after the fact.

That not all is sweetness and light can be seen from the irate comments of the Canadian deputy chief negotiator of the FTA. Writing just before the extraordinary challenge panel in the pork case had reported, he complained bitterly of the unanticipated "bloody mindedness" of United States agencies whose actions seemed to ignore the spirit of the Agreement. He was not referring to those directly engaged in the dispute settlement system; he praised the Chapter 19

panels as having "met all expectations. Their work has been highly professional, and the deadlines have been respected."[29]

The Canadian government's satisfaction with how the FTA was working was undermined in 1992 when the Department of Commerce's International Trade Administration adversely determined the rules of origin on certain Hondas assembled in Canada and revived the softwood lumber subsidy issue, a long-standing source of friction.[30] A quick succession of countervailing duties added to Canadian problems. Canada was already suffering from a more intense and prolonged recession than the United States. So disturbed was Prime Minister Mulroney's government that he sought out President Bush in the spring of 1992 to ease the acrimony. Pending elections were also putting a heavy strain on efforts to prevent the politicization of particular trade problems.[31]

How have the IJC and FTA systems for settling disputes affected these institutions themselves? Whether or not NAFTA will be ratified by the legislatures, the Free Trade Agreement has not been in effect long enough to suggest the impact of experience, although after each panel decision the governments have expressed satisfaction with the development of the system. So far, frequency of resort to panel inquiries has not overburdened the organizations involved. As indicated above, the outcome of the extraordinary challenge of the pork panels was a critical step in reassuring that the procedures could resist political pressure and work fairly. If the working group on subsidies fails to reach agreement, some observers believe that the accumulated Chapter 19 panel decisions may themselves offer guidance to acceptable practice.

If the issues are easily definable, fact-finding becomes easier; the IJC won its reputation when the disputes could be clearly outlined. That in recent years environmental controversies between the two countries are usually more general and diffuse in origin is one reason for changes in how the IJC operates. Acid rain involved so many conflicting interests that the issue was not referred to the IJC to resolve, although it was later assigned the responsibility for monitoring and settling disputes under the Canada-United States Air Quality Accord.

Both the IJC and FTA officials are shielded from hostile opposition by having their scope confined to the politically acceptable. Thus, each system can count on constituency support to keep it in operation. On several occasions suggestions have been made about "strengthening" the IJC by giving it greater powers, but the view prevails that it works best when steering clear of touchy issues.

Do the activities of the IJC and FTA system have any effect on third countries? Although for many years the model of the IJC was held up for others to copy, none has done so. In any case, it deals with singularly

local conditions, whatever the general rules it may follow. The most general, that downstream interests across a border should be protected from adverse actions on the other side, is independently accepted elsewhere today. FTA panels dealing with dumping and trade-distorting subsidies affect only the participants. They do not apply to exports of other countries.

ALTERNATIVE SYSTEMS FOR SETTLING TRADE DISPUTES

Since a third country is involved in NAFTA, other ways to settle trade disputes can be compared to those examined here.

GATT

The dispute settlement system of the FTA is related to that in GATT in several ways. As indicated earlier, investigations by a neutral small panel for each complaint were modelled after GATT, but modifications were made to avoid perceived defects in the GATT procedures. These changes were expected in turn to improve GATT methods if later adopted, in particular, the FTA's rigid time schedules for each phase when the parties failed to resolve a dispute between them through consultation. Although the three to five members of GATT panels are supposed to act in their individual capacity rather than to represent their government, in practice they have been drawn mostly from diplomatic missions in Geneva other than those of the disputing parties. In contrast, FTA panelists are citizens of the two member countries but not government officials. (Persons formerly in the government are acceptable and have been chosen for some panels.) FTA panelists are also expected to be familiar with North American legal practices, a somewhat unlikely characteristic of GATT panelists.

A more serious impediment to neutrality in the GATT procedures is that any member can block acceptance of a panel report which must be approved by consensus. This rule has been a major cause of delay or obstruction, and one proposed reform in the Uruguay Round is to change this barrier. The whole GATT system has depended on the notion of an exchange of rights and obligations and an avoidance of a punitive approach. Reciprocity is supposed to be founded on compensation. But implementation resembles the FTA in that it depends on the individual state, not some collective act. One major issue not yet solved in GATT is how to regulate safeguard actions to prevent their abuse, possibly cancelling out the advantages of a concession. In the FTA, arbitration is obligatory for safeguard disputes unresolved by consulta-

tion. Unlike GATT rules, panel decisions about anti-dumping and countervailing duties are binding. This is a novel provision even though confined to questions about the correct application of the individual member's own laws. Implementation of GATT rulings has been much less certain.[32]

Despite the defects of GATT's dispute settlement system, both Canada and the United States have taken cases to it in recent years, or have threatened to do so. The United States has suffered occasionally from other members' ability to intervene or block a report. Thus, the Americans have tried to change the unanimity rule, even though the United States has sometimes exploited the right to prevent publication.[33] On other occasions it has sought a GATT ruling on an issue later examined by the FTA process. Chapter 18 of the Free Trade Agreement provides that GATT can be chosen as an alternative route, but once the route has been selected the case can only be considered by the procedures of that system. Whichever the route, the fact-finding panel is supposed to answer, in effect, whether the disputed action is consistent with the relevant agreement, and whether or how it has deprived the complainant of the benefits of the agreement. Like the others, GATT panels can suggest a resolution of the dispute. Just as Canadian and American trade officials are in constant contact in Washington and Ottawa on matters relating to the FTA, so trade officials from the two governments are in regular communication with each other in Geneva, the seat of the rather small GATT secretariat.

Mexico was unwilling to join GATT until 1986. Since then it has won a favorable GATT panel ruling regarding the American restraints on the import of tuna caught by means endangering dolphin. But Mexico declined to press its advantage in GATT, preferring to negotiate a successful compromise with the United States.[34]

Australia-New Zealand Closer Economic Relations Agreement

Canada is not the only country having very close economic relations with a bigger neighbor to which it is tied by special trade relations and cultural similarity. New Zealand is similarly situated with respect to Australia, and the two states have a Trade Agreement on Closer Economic Relations comparable to the Canada-United States FTA, though with significant differences. Each set of states has copied some practices of the other. One difference is the way disputes are to be settled. There is no formal arrangement for resolving controversies nor is that any formal organization for implementation. Instead, the parties rely on

consultations and, where necessary, resort to the individual courts of the two parties. Following progressive liberalization of the 1983 treaty, by 1990 all border restrictions in trade and goods had been removed. More significantly, export incentives had either been reduced or eliminated entirely and anti-dumping duties ruled out. In place of such duties, the parties are harmonizing their competition (anti-trust) laws, enforceable in their own courts. Thus, what have been the major sources of trade disputes between Canada and the United States will disappear in the South Pacific.[35]

The trade agreement between Australia and New Zealand is wider in scope than the Canada-United States agreement, since it includes services. These are defined so broadly that disputes over what is covered are not anticipated. In Australia, a federation, earlier controversies had arisen over trade obstacles arising from the states' licensing and certification powers, but Australian state practice is gradually being "nationalized" and thus covered by the agreements. Regulatory agencies in the two countries are cooperating in gathering evidence and exchanging information. The differences between the Australia-New Zealand agreements and the Canada-United States Agreement can be explained in part because Australia and New Zealand both have parliamentary governments with very similar governmental practices, unlike the North American neighbors. In addition, their relations with each other have traditionally been more informal and less legalistic.

Nordic Council

A similar tradition marks another asymmetrical trade partnership between Norway and Sweden. These two countries have many kinds of institutional ties through their common membership in the Nordic Council. This organization involves a total population of 23 million (less than Canada's and about three million more than Australia and New Zealand combined.) It was formed for cooperation among five Nordic countries which share cultural, economic, social, political and geographical characteristics. Three other entities are also included: Greenland, the Faroe Islands under Denmark, and the Aaland Islands under Finland. Compared to Canada and the United States, the members are more closely tied by mutual agreements in some fields, such as having a common labor market and free movement of persons across their borders without loss of social benefits. However, their trade ties have principally been through membership in the European Free Trade Association (EFTA), currently eroding as some members seek to join the European Community.[36] Tariffs on industrial products exported to one or another were removed in 1967. However, the Nordic Council is still planning for greater economic cooperation, which, *inter alia*, would

eliminate some trade barriers already addressed in the Canada-United States Free Trade Agreement. These include the reduction or elimination of government support to particular industries and freer trade in food products.[37]

The absence of a formal system for settling disputes on trade matters in the Nordic Council satisfies Norway and Sweden, which prefer to handle controversies at the lowest administrative level feasible, avoiding any tendency to politicize them. Customarily, a Norwegian trade official would discuss the problem informally with his counterpart in Sweden by telephone, similar to North American practice. Responsible ministers might enter into a memorandum of understanding with each other. It would be out of character for the two governments to resort to formal dispute settlement procedures in GATT. Like Australia and New Zealand, much of the law in the Nordic countries is harmonized, thus eliminating some causes for dispute. A large portion of the resolutions passed by the Nordic Council has been accepted by the member countries which are obligated to make an annual report on implementation. These observations apply as well to environmental questions; Norway and Sweden are parties to the Nordic Environmental Protection Convention and to a convention protecting the marine environment.

European Community

In the European Community (EC), disputes on trade which might arise between neighboring members of unequal economic strength are dealt with quite differently. The organization of this supranational group of twelve members, covering a population of about 335 million, is elaborate and formal. "Community law" has been developing over decades as this common market has become increasingly integrated. It will be even more so by the close of 1992. In recent years the EC rules have also covered environmental questions. The treaties and legislation adopted under the agreements are applied by the European Court of Justice. Thus, issues involving trade barriers would be handled by judicial determination. Normally, the European Commission institutes a suit where an obligation or right of a member is involved, although members and even individuals could do so. In practice, members are reluctant to confront each other directly. They usually ask the Commission to act on their behalf if, upon appeal to the Commission, it concludes that proper compliance with Community law has failed. In recent years the European Court has devoted much of its attention to preliminary opinions on the application of Community law. In the event of inconsistency, this law takes precedence over national law.[38]

This brief summary of dispute settlement methods in other associations of disparate membership indicates that the arrangements between Australia and New Zealand most closely resemble the Canada-United States Free Trade Agreement. Still, for various reasons Australia and New Zealand rely on much more informal methods. The IJC system remains *sui generis*, but its work in helping to implement the Great Lakes Water Quality Agreements somewhat resembles the way the Nordic Council promotes cooperation to avoid causes for dispute. Neither the relaxed and informal methods of neighbors with similar culture and government system nor the formal procedures for the supranational European Community appear to fit the needs of an association between the less developed country of Mexico and its North American neighbors. The methods for settling disputes employed in GATT, if projected reforms are adopted, would seem a more feasible model for the NAFTA as they were for the FTA.

SUMMARY: FACT-FINDING AND DECISION-MAKING UNDER THE IJC AND FTA

Regardless of the type of organization, members are likely to resort first to negotiation and "consultation." This study has concentrated on a possible next step taken by Canada and the United States—the almost unique fact-finding methods under neutral auspices confined to the two members of the IJC and FTA. The scope of these bilateral organizations is distinctly limited, by no means covering all environmental or trade issues (although the IJC's tasks are no longer strictly confined to the border). Settling disputes in both is case by case without regard to precedent. Interests which are involved in these cases are highly specific and circumscribed; the cases deal with very small parts of the total environmental or economic contacts making up the densely-woven relationship between the two countries.

These restrictions impose a limited impact, if any, on national policy, but that is one reason for their success in keeping relatively small disputes small and not politicized. Both institutions are engaged in activities other than dispute settlement which have greater political implications because they are broader in scope. Fact-finding is basic to the success of these other enterprises, referred to earlier. What distinguishes settling disputes through investigation for acceptable facts is the non-political recommendations made as a result. The procedures do not include the exchange of concessions through bargaining as is the case with negotiation. Instead they ensure that the policy makers, who must make the authoritative determinations, start from the same basic under-

standing of the problem as it is explained by technical or professional experts.

This stress on technical aspects has not meant that either the IJC or the FTA operates in a political vacuum, even though their functions as settlers of disputes deliberately have been circumscribed by the focus on fact-finding. While they are protected from undue political influence by their terms of reference, the two governments have already agreed on the general procedures and the question to be answered, thus setting the political parameters. Since the FTA is questioned by vocal Canadian opponents of substantial political size, every move is watched in the media and parliament. The Agreement's provisions have saved Chapter 19 cases from arousing much political conflict, but the two Chapter 18 cases, interpreting the Agreement in disputes about regulating salmon, herring and lobsters, could not be settled without further negotiation. At least fact-finding narrowed the range of dispute. As for the IJC, the pragmatic specificity of its tasks has usually insulated it from acrimonious political confrontations, and over the years it has taken care to remain responsive to political winds by not stepping over well-defined limits in its work. But in at least one case, the Garrison Diversion, its recommendations waited on the effect of domestic political forces in the United States before the final disposition occurred.

In the swirling pressures of special interests, both these organizations have provided politicians with welcome sanctuary from their impact. The outcome of the extraordinary challenge in the FTA's pork case offered the hard-pressed Canadian government proof of the dispute settlement system's independence. At the same time it gave the American administration a way to respond to pressure while not damaging the system's freedom from political influence. FTA cases deal with fragmented interests that rule out formation of a coalition which would include those indifferent to the need for settlement. In the IJC cases, interest group pressure presents a different aspect; support from transnational groups with mutual concerns is a positive influence. But the IJC, as an international body, finds its scope limited by domestic bureaucratic interests contending for jurisdiction. Still, when references are made to the IJC, agency officials who participate in the inquiries act professionally. They may debate vigorously about some facts but eventually reach consensus on the technical questions involved.

The long-developed reputation which the IJC has earned for impartiality is now carefully cultivated by those involved in the FTA. Officials in both governments have commented favorably on this feature. A high official in the United States International Trade Commission, for example, praised the Chapter 19 panels for their fairness and

absence of national bias. She added that her agency was aided by requirements to clarify the terms of decisions questioned by panels.[39]

That "level playing field" desired by each government for different reasons has been promoted by both organizations. As Simon Reisman, head of the Canadian team negotiating the FTA, has noted, with Chapter 19 the United States was taking a big step in having its own records examined by a panel with a neutral chairman and accepting the review as binding.[40] A former Canadian ambassador to the United States, Allan Gotlieb, put it vividly: "It is better to have clear rules and fair-minded referees on the playing field than to be scrambling on someone else's terrain and playing, as often as not, according to their rules and without any referees at all."[41] The United States has accepted parity in the organization despite greater strength partly because issues could be dealt with on a technical level and the procedures screened off from potentially divergent "national interest." This had already been demonstrated by the IJC.

The IJC succeeded best in manifesting impartiality when its investigations were able to conclude with something for both sides. When this was difficult the commission could sometimes expand its inquiry into alternative solutions which widened the choice of the governments. These included how compensation could be made to the side which would otherwise lose from implementing the results of an investigation. Balancing benefits to the two sides in the FTA disputes appears to be more difficult. Chapter 19's provisions would seem to rule out such an effort. When the Chapter 18 panel's finding in the salmon and herring case sought to give some satisfaction to both sides, it was criticized for ambiguity. Although the Chapter 18 panel recommendations on lobster size also appeared to give solace to the losing side, that controversy continued as well. Yet in this case as in some dealt with by the IJC, there were divisions of interest within one or both countries; thus, opportunities for compromise were politically available. In any case, the chance to conciliate through some reciprocal benefit has been welcome to Canadian and American officials who usually shy away from a retaliatory approach.

Finding mutually acceptable technical solutions has been made easier in the IJC inquiries because the fact-seekers have become acquainted over the years, and through personal contacts they have developed confidence in their colleagues on the other side. This has promoted a situation of trust which has been characteristic of the commission's activities, based on knowledge and sensitivity to the preferences of co-workers across the border. Sharing information has led to shared interest. The organization for carrying out the Free Trade

Agreement does not allow for this particular kind of transborder *esprit d'corps* to develop. But there are other more informal ways in which Canadian and American trade officials have maintained personal contacts with each other in the capital cities which flourish because of their common desire to make the Agreement work.

Trust is growing, too, from the transparency in operating agencies' decision-making, flowing from the FTA Chapter 19 procedures. Willingness to open up the administrative files, ordinarily an action uncongenial to governments, indicates that the Americans have some trust in the neighboring government. As experience with the dispute settlement system grows, so does an expectation that the rules will be observed, instilling Canadian confidence in the system. Eliminating surprises was one objective for setting up the machinery. This was accompanied by the desire to avoid *ad hoc* treatment each time a dispute arose because the consequences would be unpredictable.

Predictability—a basic rationale for organizing ways to settle disputes—has several aspects. Since the FTA affords an objective test of import restraints, it could check the filing of frivolous actions, thus saving exporters time and money. Greater certainty about how countervailing duties will be applied must await a code for subsidies. Meanwhile, the Chapter 19 procedures provide for a kind of "holding pattern," since the panels cannot address themselves to changing the laws. Nor can they cover protectionist acts of states, provinces, or municipalities, the source of many subsidies and procurement restrictions.

Some trade disputes can be prevented by further negotiation to construct new rules, just as establishing patterns for applying rules already accepted and monitoring these practices can avoid some causes of controversy. The IJC's role in fleshing out the Great Lakes Water Quality Agreement and the 1991 Air Quality Accord should also eliminate some need to settle disputes; polluting events should occur less frequently as remedial action takes place. With more information becoming available, many misunderstandings should disappear. In the process, the IJC appears to become "more a long-term consensus builder than a short-term dispute solver."[42]

Shared knowledge, not enforcement capacity, is the basis on which both the IJC and the FTA authority is exercised. Without administrative power on their own, institutions nevertheless ensure that the operating agencies receive the facts to form a foundation for decisions if they choose to act. To be effective the recommendations of inquiries under either system may have to get the attention of the policy-makers at the highest levels. This has been difficult for the IJC. However, the agenda

for regular meetings of the prime minister and president or of the secretary of state and minister of external affairs and international trade now include its activities.

The FTA has no problem in attracting attention either in Canada or in Congress. Since the FTA's Commission is composed of the two top trade officials of cabinet rank, they are bound to be aware of panel recommendations. The very existence of the FTA procedures reminds the executive branch of Canadian interests which need to be taken into account. In contrast, the way Congress conducts its affairs, these interests—and the Agreement—can occasionally fall through the cracks and only be recovered later. Yet relevant policy makers are likely to remain cognizant of the FTA, since it is still developing, and consulting and bargaining to fill out the details continued even during the maneuvering over NAFTA.[43]

CONCLUSION

A preliminary trilateral accord was announced by the United States, Canada, and Mexico on August 12, 1992, modelled in large part on the Free Trade Agreement but with some important additions and modifications. The dispute settlement system is strengthened by providing a safeguard against unilateral action which denies the benefits of the panel procedures and by permitting expeditious review of any retaliation alleged to be excessive. Financial services are also covered. Neutrality is promoted by allowing for the chairperson of a panel to be chosen from the third member or from a neutral country.

Will the amended system prove effective in managing controversies among the three governments? The experience of Mexico's neighbors in settling disputes between each other points to some underlying conditions helping to explain their success. We can then ask whether or not these conditions also exist for the new system of managing controversy between three neighboring countries of widely different economic and political power.

The basic circumstances which may account for the effectiveness of the IJC and FTA in settling disputes appear to include several factors. The parties share a social and political culture and are highly interdependent in matters of trade and the environment. They value agreement above the advantages of winning a particular dispute and are ready to recognize a common problem. The facts in the controversial situation are ascertainable by experts whose impartiality is acknowledged. The controversy can be separated from larger or different issues, and the

question to be answered is precise. Acceptance by the two parties of general rules to be followed precedes the effort to settle the discrete dispute, which includes the power of final disposal by the two governments after advice from the fact-finding procedure. Those involved in the process feel a personal incentive to keep the agreement going. They have an opportunity to be in continuing contact with each other and to develop trust in one another. The secretariat is small, avoiding bureaucratic rivalries. It does not have to be joint. There is some connection, nevertheless, between the organizations and the decision makers and operating agencies. In the case of the IJC, it is through the personnel of the international advisory boards and commissions, and in the FTA, by imbedding the arrangement inside the appropriate national agencies through the leaders. Monitoring the way agreements are being carried out provides additional reassurance to the parties, which in any event prize their reputation for respecting international contracts. The longer the system has worked the greater the confidence in maintaining it, since this has induced a sense of certainty and since the costs of abandonment have seemed too great. All of these conditions may not be necessary for settling disputes effectively under NAFTA, and certainly they are not sufficient to explain the success of the IJC and FTA. The experience of other disparate but friendly neighbors attests to this fact.

Mexico resembles Canada in some ways. Trade with the United States is similarly asymmetrical, as the two smaller neighbors are much more dependent upon exports to the big power than the United States is upon trade with them. Although Canada's trade with the United States is far higher than Mexico's, Mexico is still the third most important American trading partner. Both American neighbors are traditionally fearful of U.S. economic influence, although suspicion in Mexico, despite being culturally somewhat less vulnerable to American penetration, is far stronger. The Mexicans' historic resentment of the American conquest of their territory and later interventions coupled with their revolutionary ideology, based partly on anti-Americanism, underlie a pervasive distrust. Thus it was as surprising as the Canadian FTA initiative that the Mexican government under President Carlos Salinas de Gortari sought a similar agreement with the United States. Political opponents of the Mexican proposition have been just as vocal as Canadian opponents to the Canada-United States FTA, and some of these Mexicans and Canadians teamed up to fight the NAFTA negotiations.

Although less wide-ranging than those across the Canada-United States border, private transnational networks also exist between Mexico and the United States. Mexican lobbyists are almost as skillful as Canadians in their efforts to influence United States policy-making. On

the southern border of the United States, the International Boundary and Water Commission has tasks concerning the joint river systems somewhat similar to some of the IJC responsibilities. It has also succeeded in depoliticizing some issues through investigations by technical experts.[44]

Despite these similarities between Canada and Mexico, the two nations are different in ways which raise serious questions about successfully carrying out FTA methods of dispute settlement. In some ways it would seem that the Mexican leadership could exert greater control over implementation. The Mexican government remains an authoritarian regime with one-party dominance in contrast to the politically contentious parliamentary democracy of Canada. Mexico's government is highly centralized in contrast to the loose Canadian confederation. Mexican interest groups are less able to exert effective pressure on their government than Canadian interests. Despite the path-breaking efforts of the Salinas government to privatize state enterprises, Mexico does not approach Canada's entrepreneurial economy.

Mexico lacks the wealth, experience, knowledge and technical capacity which has made Canada a long-time ally and easy partner of the United States. Although Mexico has highly competent professional and technical specialists, the reservoir of such experts who could serve in a neutral capacity in settling disputes is much smaller than Canada's. The Mexican government looks to NAFTA to hasten its development, and one major objective of the United States is just that. This aim is unlike those the Americans had for the Canada-United States Free Trade Agreement, which were based on the assumption that both countries were highly industrialized, private-enterprise democracies. Reflecting the difference between Canada and Mexico, American opponents of NAFTA have raised voices not heard when the Canada-United States Free Trade Agreement was being negotiated: those of labor unions and environmental protection groups. These differences suggest that the tasks of settling disputes under a trilateral agreement will be more formidable than those arising under the Canada-United States FTA. They have already posed significant obstacles as the United States administration moved toward persuading Congress to accept the Agreement by early 1993, the deadline set by the fast-track rules.

What kinds of problems under NAFTA would limit the benefits from following IJC and FTA procedures? The reverse of their virtue in being able to deconstruct controversy has been their limited scope. This has restricted them from contributing much to overarching solutions to policy conflicts. But that is properly left to negotiation. More important is the narrow range of group interests which can be included in their purview. This problem is less serious for the IJC which deals with

essentially local situations. Furthermore, the commission has made strong efforts to bring in various interested groups, at least to hear their views. In any case, those who conduct their investigations include officials from municipal, state/provincial, and national levels of government, thus allowing for differing perspectives.

Limited interest representation is much more significant in the FTA dispute settlement activities, even though other aspects of the Agreement alleviate the problem. The extremely dense trade relations between the two countries mean that the FTA cannot cover many large segments of exchange. Some are specifically excluded. The Agreement cannot deal effectively with the procurement practices of states, municipalities and provinces. As in most other international economic compacts, producers' interests rather than consumers' are the concern of the FTA. The distribution of benefits from the dispute settlements is distinctly haphazard.

Other limitations on the effectiveness of the IJC and FTA systems for dispute settlement relate to the types of issues involved. Finding a balance, or at lease a solution in which both parties gain something is harder in settling trade disputes than some environmental controversies. While economic interests may be much more numerous, it must be left to diplomacy to make satisfactory exchanges of concession. Nor can the resolution of a trade dispute easily recognize non-tangible values such as the smaller government's need to demonstrate to the public that it is maintaining control over some threatened activities. The IJC finds it somewhat easier to take note of non-tangible values; it has given attention to such matters as the aesthetic features of Niagara Falls. Nevertheless, finding "facts" and measuring non-tangible values present great difficulties.

The terms of the Canada-United States FTA only slightly reflect the interests of those outside the two countries; the settling of disputes is exclusively bilateral. Under NAFTA the third member may participate in a proceeding involving a dispute between the other two. There can even be a conflict between the right to resort to GATT and actual practice. Sometimes using the GATT route favors one side more than the other, and this can generate conflict between the two governments over the venue for handling a dispute.[45] It is unrealistic to confine most trade arrangements to bilateral (or even trilateral) treatment. Foreign economic relations today are decidedly multinational, and all trading nations care about access to foreign markets. Extending the free trade area to Mexico opens up the question of access for other Western Hemisphere countries as well as posing the danger of undermining the effectiveness of GATT in liberalizing trade world-wide.[46]

Including Mexico in a trilateral trade agreement has required some formal provisions for dispute settlement; this also was necessary in the FTA to cover cases where the usual informal contacts between opposite numbers in the governments of the United States and Canada could not resolve a controversy. More informal methods work in the relationship between Australia and New Zealand and in the Nordic countries. But in none of these countries is there the preference for a legalistic approach characteristic of American officials who like to define procedures carefully in legal terms. Such a style may be appropriate, considering the monstrous size of the United States government with its strongly competing agencies. Although other countries may not feel the need perceived by Canadians to have formal boundaries demarcating their relations with their superpower neighbor, Mexico is bound to feel it.

More formal methods available to the United States and Canada have included arbitration, which is provided for in both the Boundary Waters Treaty and the Free Trade Agreement. But the two countries have usually preferred not to settle disputes this way, partly because they do not want outsiders with less understanding of North American perspectives to be involved. This may also be another reason for not depending completely on GATT methods, which are in any case regarded as too slow. The two countries normally have drawn back also from more confrontational methods such as unilateral retaliation for some alleged injury. Experience has shown that it is too costly, especially in hurting domestic interests not directly involved in a dispute. Furthermore, retaliation breeds further retaliation, a result neither country desires. Similar inhibitions are likely to characterize NAFTA.

The normal method of handling controversies between states is negotiation. But this means the "nationalizing" or "politicizing" of a dispute which could more easily be handled by methods such as those treated in this study that concentrate on impartial fact-finding under agreed-upon rules. How has resort to the IJC and FTA methods of dispute settlement enabled Canada and the United States to limit controversies? By eliminating uncertainty and misunderstanding of the facts, they have been able to concentrate on possible solutions. Those who are entrusted with finding the facts have maintained their reputation for impartiality, because they are not chosen as representatives of particular interests but for their professional expertise. There can easily be honest disagreement over scientific or technical "facts" as well as legal "facts," especially when potential as contrasted to actual injury is to be determined. Yet consensus has eventually been achieved in cases related to both the environment and trade. Clearly, there has been a "strain towards agreement" both among those responsible for finding the facts

and among political leaders. One reason may be that the controversies have been broken up into small fragments for examination. Usually both those immediately concerned and the higher levels of government have preferred to keep the disagreements on a low level. They do not want them to fester until they become a national issue or a political football to be used by opponents of the administration. Since foreign trade issues can rapidly become heated political controversies at the national level in Canada, both governments have reason to prevent this development. NAFTA might eventually result in similar tendencies.

Still, it is often not enough to find facts which lay the basis for common assumptions regarding a controversy and/or clarify alternative courses of action. The divergent interests of the two countries remain, as can be seen in the long struggle between the Canadian and United States governments over what to do about acid rain. Nevertheless, how interests are conceived may change through the dispute settlement procedures examined here. The differing views of the Americans and Canadians over government subsidies as they affect bilateral trade may eventually change as they learn how the subsidies actually operate.

Other than dampening international conflict, are there ways by which the dispute settlement system examined here can serve the public interest in the member countries? The FTA provides for political accountability through the composition of the commission composed of the two cabinet officers responsible for trade matters. In the United States, this official often appears before Congressional committees. Although the IJC is independent of the two governments, it has done much to involve the interested public in its investigations, most particularly in the Great Lakes region. Both systems meet high standards of transparency as their panels and boards permit outside scrutiny of decisions made by the administrative agencies involved in their work. Both domestic interests and cross-border interests can benefit thereby. Transparency engenders trust in the system. How this would work in the very different Mexican governmental system is an open question. A frequently-cited work favorable to NAFTA refers to Mexico's "often opaque administration procedures," a problem which would disappear if Mexico aligns its practice with American and Canadian "open proceedings and written opinions."[9]

There are other reasons why Mexicans could profit from the dispute settlement procedures similar to those examined here, as the other smaller partner of the United States has demonstrated. Note Professor John Crispo's trenchant remark that Canadians will no longer have to go to United States agencies "as supplicant, begging and grov-

elling and saying, 'Please make an exception for Canada,' or `Remember the Hostages in Iran.'" Canada has had an equal voice in the FTA procedures, just as it has long had in the IJC. For this reason, Canada, as the smaller partner, has had a better chance to influence the outcome than in some negotiations where its bargaining position may be weaker than the American. For example, in negotiating a subsidies code, the United States will have much less to gain from making concessions and thus be more unwilling, because the proportion of its total exports going to Canada is far smaller than the proportion of total Canadian exports going to the United States.[48]

While channelling the exercise of power through agreed-upon rules may be more important to the smaller partner, the United States had its own reasons for recourse to the IJC and FTA. Since the disputes involved only a fraction of larger issues, rough reciprocity has been enough. Half a loaf is better than a whole loaf if the only way to the latter would cause undesirable acrimony threatening other interests. By acquiescing, the Americans could prevent some relatively small private interest from threatening the larger relationships with a neighbor which is the biggest trade partner of the United States and with which it has the longest border in the world. Employing the dispute settlement methods described in this study has avoided unwanted confrontation while relieving the government of some domestic pressure, whether from private interests or from Congress. Fact-finding has usually provided some alternatives to objectionable government action. Similar considerations could apply to Mexican-American relations.

The Americans have shared some motives with their smaller northern partner. There may have been a common problem to be solved, one which could not be solved alone. They both believe that following these methods of dispute settlement promotes competitiveness in world trade and/or improves environmental quality. They both prefer predictability, reliability, and continuity in relationships with each other, all of which are provided by following the procedure available through the IJC and the FTA. By increasing information on specific environmental or trade problems the two governments face together, they have been able to diminish the area of disagreement. Self-interest, especially when defined in economic terms, is not the only value either government has sought. They both value a reputation for observing international obligations and for following earlier accepted rules. Comparable motives could be shared with Mexico.

In the light of Canadian and American experience with dispute settlement we may hazard the following generalizations. When, in a controversy which concerns trade or the environment, highly interde-

pendent neighboring states of unequal power but similar culture agree on rules for settling disputes because they have overarching goals, they can reduce the extent of contention between them through fact-finding by fragmenting issues and using neutral investigators from their own countries on an equal basis. Involving officials from responsible agencies is probably necessary for implementation. By following this course, they can reduce the chance of an environmental or trade dispute issue becoming politicized, merged with other issues, and thus not settled on its merits. To apply these generalizations to NAFTA, the main problem will be Mexico's cultural differences from the United States and Canada.

GLOSSARY

EC = European Community
EFTA = European Free Trade Association
FTA = Free Trade Agreement
GATT = General Agreement on Tariffs and Trade
IJC = International Joint Commission
ITA = International Trade Administration
ITC = International Trade Administration of U.S. Department of Commerce
NAFTA = North American Free Trade Agreement
USTR = United States Trade Representative

NOTES

N.B.: Much of the information about how the IJC and FTA organizations operate comes from interviews with the secretariat (U.S. branch) of the IJC, the USTR, Department of Commerce, Congressional Research Service, Department of State, Canadian-American Committee, Canadian Embassy to the United States, as well as Norwegian and Australian Embassies. I am much indebted to current and former members of these groups for their kindness in providing valuable insights into their work.

[1] John H. Jackson's distinction in *The World Trading System* (Cambridge: MIT Press, 1989), 85-86.

[2] Charles F. Doran, *Forgotten Partnership: U.S.-Canada Relations Today* (Baltimore: Johns Hopkins, 1984), 252.

[3] Murray G. Smith, "The Canada-U.S. Agreement in an International Context," in Murray G. Smith and Frank Stone, eds., *Assessing the Canada-U.S. Free Trade Agreement* (Halifax: Institute for Research on Public Policy, 1987), 71.

[4] Andrew H. Malcolm, *The Canadians* (New York: Bantam Books, 1986), 180.

[5] For example see D.H. Dinwoodie, "The Politics of International Pollution Control: The Trail Smelter Case," *International Journal*, vol. XXVII (Spring, 1972): 219-35; Neil A. Swainson, *Conflict Over the Columbia: The Canadian Background to an Historic Treaty* (Montreal: McGill-Queens, 1979); William P. Willoughby, *The St. Lawrence Waterway: A Study in Politics and Diplomacy* (Madison: University of Wisconsin Press, 1961); and Robert Spencer, John Kirton, and Kim Richard Nossal, eds., *The International Joint Commission Seventy Years On* (Toronto: University of Toronto, 1981).

[6] Gilbert R. Winham, "Why Canada Acted," in William Diebold, Jr., ed., *Bilateralism, Multilateralism and Canada in U.S. Trade Policy* (Cambridge: Ballinger, 1988), 44.

[7] Softwood lumber was one exemption. This long-standing political issue about whether lower stumpage fees in Canada constituted an unfair subsidy was temporarily alleviated by a 1986 memorandum of understanding, in accordance with which Canadian authorities im-

posed an export duty. Conditions having changed, Canada revoked the understanding, resulting in an outcry from powerful members of Congress from the Northwest. In response the Department of Commerce began the lengthy process of applying a countervailing duty late in 1991, imposing a provisional duty in March, 1992. The Canadian government took the case to GATT and declared it would also resort to the FTA procedure if necessary. It was not mollified when the United States International Trade Commission cut, but did not eliminate, the duty. This was one of the heated issues Prime Minister Mulroney raised directly with President Bush when they met in May, 1992. *International Trade Reporter*, September 25, October 9, 16, November 13, 1991; March 11, 25, April 8, 1992; *New York Times*, October 4, 1991; May 21, June 26, 1992.

[8] Arnold Heeney, in O. P. Dwivedi, *Protecting the Environment: Issues and Choices* (Toronto: Copp Clark, 1974), 270.

[9] While the IJC could occasionally prod the two governments and warn of adverse consequences from a particular action, the FTA commission is part of the two governments and warnings would have to be much less public.

[10] *MacLean's*, January 16, 1989, 2. With a much smaller source of qualified candidates the Canadian government has had some difficulty finding appropriate nominees not already associated with some trade issue.

[11] *International Trade Reporter*, February 7, 1990, 206.

[12] United States General Accounting Office, *Need to Reassess U.S. Participation in the International Joint Commission* (Washington: General Accounting Office, 1989), 20.

[13] For a comprehensive comparison of the two governments' systems for carrying out the accord, see David Leyton-Brown, "Implementing the Agreement," in Peter Morici, ed., *Making Free Trade Work* (New York: Council on Foreign Relations, 1990), 27-59.

[14] For example see John E. Carroll and Roderick M. Logan, *The Garrison Diversion Unit* (Washington: National Planning Association, 1980), 45.

[15] International Joint Commission, *Impacts of a Proposed Coal Mine in the Flathead River Basin* (Washington: IJC, 1988). The coal mine project did not go forward.

[16] *International Trade Reporter*, August 2, 1989, 1019; September 27, 1989, 1241; July 18, 1990, 1102; August 22, 1990, 1303; September 25, 1990, 1475.

[17] *Ibid.*, May 9, 1990, 660; May 16, 1990, 691; December 20, 1990, 1655; January 17, 1991, 99.

[18] International Trade Administration, Department of Commerce, "Binational Panel Reviews and Extraordinary Challenge Committees: United States-Canada Free-Trade Agreement," Part 1, 7a (*Federal Register*, vol. 53, No. 251, December 30, 1988).

[19] *Ibid.*, Part VII, 74.

[20] In a special issue of the *American Review of Canadian Studies* (21, nos. 2/3, Summer/Autumn, 1991) devoted to the Free Trade Agreement, Allan R. Taylor attempted a preliminary scorecard. Of the first fourteen panel decisions he found three to be compromises, six "positive for Canada," and five "positive for the United States"; see Canada-U.S. Free Trade Agreement: Second-Year Review," 177.

[21] 21. *International Trade Reporter*, July 26, 1989; August 30, 1989, 1115; October 3, 1989, 1544; November 8, 1989, 1442; January 17, 1990, 81; September 12, 1990, 1352; October 3, 1990, 1504; October 17, 1990, 1341; October 31, 1990, 1644; December 19, 1990, 1915; January 2, 1991, 9; January 30, 1991, 155; February 20, 1991, 264; February 27, 1991, 303; March 6, 1991, 342; March 13, 1991, 380; March 20, 1991, 438; March 27, 1991, 495; April 3, 1991, 497; April 1, 1991, 540; April 17, 1991, 569; April 24, 1991, 612; June 19, 1991, 933; *Toronto Globe and Mail*, June 15, 1991; *New York Times*, June 15, 1991.

[22] Peter Morici has predicted that elevated confidence resulting from the FTA dispute settlement system will encourage greater cross-border investment by smaller enterprises. *A New Special Relationship: Free Trade and U.S.-Canada Economic Relations in the 1990s* (Ottawa: Centre for Trade Policy and Law, 1991), 136.

[23] One member of the Canadian negotiating team for the Free Trade Agreement, who later was in charge of trade policy analysis in the Department of External Affairs and International Trade, has itemized his reasons for asserting that resort to trade remedy actions had definitely declined since the agreement came into force. Michael Hart, "A Lower Temperature: the Dispute Settlement Experience Under the Canada-United States Free Trade Agreement," *American Review of Canadian Studies* 21 (Summer/Autumn, 1991): 202-3. Later events seem to belie

this conclusion; still, the Canadian government's recourse to the FTA procedures indicate its trust in the system.

[24] *International Trade Reporter*, December 20, 1989, 1653; February 7, 1990, 206; May 2, 1990, 623; May 23, 1990, 727; May 30, 1990, 760, 764; August 23, 1990, 1300; November 14, 1990, 1730.

[25] General Accounting Office, *op. cit.*, 4.

[26] Congressmen sometimes cite the FTA in seeking to amend bills which would have an adverse effect on Canada; see Morici, *A Special Relationship*, 137.

[27] Though infrequent and counterproductive, retaliation does sometimes occur. Under pressure from certain agricultural interests the United States abandoned a move under the FTA to accept Canadian meat inspection as a substitute for American inspection on imported Canadian meat. In response Canada then reciprocated against the American move; see *International Trade Reporter*, August 14, 1991, 1213.

[28] *International Trade Reporter*, September 27, 1989, 1226; November 15, 1989, 1564; January 17, 1990, 100; January 24, 1990, 135; February 28, 1990, 287; October 18, 1990, 1334.

[29] Gordon Ritchie, "The Free Trade Agreement Revisited," *American Review of Canadian Studies*, 21, (No. 2/3, Summer/Autumn, 1991): 210.

[30] See note 7.

[31] *New York Times*, February 18 and May 20, 1992.

[32] Among numerous works on GATT relevant to this study the following may be noted: Andreas F. Lowenfeld, "What GATT Says (Or Does Not Say)," and William Diebold, Jr., "The New Bilateralism?" in William Diebold, Jr., op. cit.; *The Uruguay Round of Multilateral Trade Negotiations Under GATT: Policy Proposals on Trade and Services*, Report of the Atlantic Council's Advisory Trade Panel (Washington: Atlantic Council of the United States, 1987); Robert P. Porter and Raymond Vernon, *Foreign Economic Policymaking in the United States: An Approach for the 1990s* (Cambridge: Harvard University Center for Business and Government, 1989); Margaret Biggs, "An International Perspective," in Robert M. Stern, Philip H. Trezise, and John Whalley, eds., *Perspectives on a U.S.-Canadian Free Trade Agreement* (Washington: Brookings, 1987); Jagdish Bhagwati, *The World Trading System at Risk* (Princeton: Princeton Univer-

sity Press, 1991); and works by John H. Jackson, including that already cited, *The World Trading System*.

[33] For example the pork case; see *International Trade Reporter*, October 10, 1990, 1542.

[34] *New York Times*, February 19 and June 16, 1992.

[35] *International Trade Reporter*, July 25, 1990, 1073 and January 23, 1991, 133; Graeme Thompson, "A Single Market for Goods and Services in the Antipodes," *The World Economy* 12, no. 2, June 1989; Ramesh Thakur, "The Elusive Essence of Size," paper presented to Princeton University Center of International Relations Research Colloquium, May 1, 1990 (typescript); "The Harmonization of Australian and New Zealand Business Law," Summary of Report to Governments by Steering Committee of Officials, June, 1990 (typescript).

[36] Meanwhile EFTA and the EC have signed a "European Economic Area" agreement which will remove trade barriers between the seven and the twelve members, respectively.

[37] "Nordic Cooperation," Norway Ministry of Foreign Affairs, Norway Information, January, 1990; Nordic Council, "Nordic Co-Operation," Stockholm, May 1986; Nordic Council of Ministers, *Stronger Nordic Countries: Economic Action Plan, 1989-1992* (Stockholm, 1989).

[38] Klaus-Dieter Borchardt, *The ABC of Community Law* (3rd ed.), (Luxembourg: Office for Official Publications of the European Communities, 1991); Neil Nugent, *The Government and Politics of the European Community* (Durham: Duke University Press, 1989).

[39] Ann Brunsdale at a conference in Ottawa. Another participant lauded the chance for oral exchange rather than having to rely only on written briefs; this unveiled the underlying problems in the case; see *International Trade Reporter*, May 17, 1991, 813.

[40] Simon Reisman in Murray G. Smith and Frank Stone, *op. cit.*, 144.

[41] *"I'll be with you in a minute, Mr. Ambassador:" The Education of a Canadian Diplomat in Washington* (Toronto: University of Toronto Press, 1991) 150.

[42] Pierre Martin, "Dispute Resolution Under a United States-Canada Free Trade Pact: Assessing the International Joint Commission as a Possible Institutional Model," paper presented at Ninth Biennial Meet-

ing, Association for Canadian Studies in the United States, Montreal, October 7-10, 1987 (mimeographed).

[43] For example an FTA panel ruling applying the rules of origin for vehicles produced in Canada in a joint General Motors-Suzuki venture covered a subject of intense bargaining in the NAFTA negotiations. The panel decided that interest costs on machinery and equipment could be included in calculating the percentage of "domestic content," contrary to a United States custom ruling; see *New York Times*, June 11, 1992.

[44] Donald Lyman, "U.S.-Mexican Relations: Time for Change," in Susan Kaufman Percell, ed., *Mexico in Transition: Implications for U.S. Policy* (New York: Council on Foreign Relations, 1988), 138-39.

[45] For example the United States objected to Canada's appeal to the GATT subsidy committee in the softwood lumber case while the Department of Commerce was still investigating the option of applying a countervailing duty following Canada's renunciation of a memorandum of understanding on this consideration; see *International Trade Reporter*, November 13, 1991.

[46] Among those who have noted these problems see Murray G. Smith, "The Future Evolution of the Canada-U.S. Free Trade Agreement: Opportunities and Risks," *American Review of Canadian Studies*, 21 (Summer/Autumn, 1991): 298-99.

[47] Gary Clyde Hufbauer and Jeffrey J. Schott, *North American Free Trade: Issues and Recommendations* (Washington: Institute for International Economics, 1992), 38.

[48] Gary N. Horlick and Debra P. Steger, "Subsidies and Countervailing Duties," in Peter Morici, ed., *Making Free Trade Work: The Canada-U.S. Agreement*, 95.

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